

IT 96-55

Tax Type: INCOME TAX

Issue: Withholding Tax - Failure To File Return/Make Payment

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	
v.)	No.
)	
TAXPAYER)	FEIN:
)	
Taxpayer)	C. O'Donoghue
)	Admin. Law Judge
)	

RECOMMENDATION FOR DISPOSITION

Synopsis:

This matter comes on for hearing pursuant to TAXPAYER' timely protest of the Notice of Deficiency dated July 21, 1994. At issue is (1) whether the taxpayer failed to deduct and withhold Illinois Income Tax from his employees' wages and pay such monies over to the Department as required under Sections 704 and 705 of the Illinois Income Tax Act ("IITA") for taxable years ending 9/30/90 and 6/30/91 and (2) whether penalties should be abated due to the existence of reasonable cause. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Notice of Deficiency dated July 21, 1994, showing a total liability due and owing in the amount of \$1,423.07.00. Dept. Grp. Ex. No. 1.

2. At hearing, taxpayer submitted an Employer's Contribution and Wage Report for the Department of Employment Security for the first quarter of 1991. This report was unsigned and did not contain any evidence of filing. Taxpayer Grp. Ex. No. 1.

3. Taxpayer introduced a copy of an IL-941 for the first quarter of 1991 and a copy of check no. 300 dated March 23, 1996. This check and return were mailed to the Administrative Law Judge and was forwarded on to the Collections Division. Taxpayer Grp. Ex. No. 1.

4. Taxpayer had filed petitions in bankruptcy court under 11 U.S.C. Chapter 7 and Chapter 11. The bankruptcy court's stay was lifted on July 12, 1991. Dept. Grp Ex. No. 1.

Conclusions of Law:

A Notice of Deficiency was issued against the taxpayer for liabilities established pursuant to Section 704 and 705 of the Illinois Income Tax Act ("IITA"). Section 705 provides in part:

Employer's Liability for Withheld Taxes. Every employer who deducts and withholds or is required to deduct and withhold tax under this Act is liable for such tax. For purposes of assessment and collection, any amount withheld or required to be withheld and paid over to the Department, and any penalties and interest with respect thereto, shall be considered the tax of the employer.

35 ILCS 5/705.

OFFICER, a corporate officer, contended that taxpayer has had no employees since the third quarter of 1990 due to slow business and further that the business closed altogether in the second quarter of 1991. Taxpayer claimed all returns were filed and paid for the third quarter of 1990. Documentation was not provided because taxpayer insisted he gave this information to the state investigators during the 1991 bankruptcy proceedings and it was never returned. The corporation did not keep copies of these business records. Under Illinois law, taxpayer is required to keep competent books and records and the taxpayer has failed to produce competent evidence to show that these records were never returned. Oral testimony without further evidence is not persuasive and I cannot rely on these statements in making my recommendation.

Pursuant to Illinois statute and case law, the Notice of Deficiency is *prima facie* correct and is *prima facie* evidence of the correctness of the amount of tax due, as shown therein. See, A.R. Barnes and Co. v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988). Section 904 of the IITA provides that the Department's determinations of tax liability shall be *prima facie* correct. It states in part:

If the Department finds that the amount of tax shown on the return is less than the correct amount, it shall issue a notice of deficiency to the taxpayer which shall set forth the amount of tax and penalties proposed to be assessed. ... The findings of the Department under this subsection shall be *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax and penalties due.

35 ILCS 5/904.

"In order to overcome the presumption of validity attached to the Department's corrected returns" the taxpayer "must produce competent evidence, identified with their books and records and showing that the Department's returns are incorrect." Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978). Oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's determinations. A.R. Barnes & Co. v. Department of Revenue, *supra*.

In the case at hand, taxpayer submitted an Employer's Contribution and Wage Report. The document was unsigned and contained no evidence of filing. Nor did the taxpayer demonstrate how these report figures tie to the corporation's books and records. For these reasons, this document alone is insufficient and does not overcome the *prima facie* correctness of the Notice of Deficiency.

Taxpayer also contends that the business closed in the second quarter of 1991. Taxpayer submitted the Illinois Department of Security's Notice of Change which is filed to notify that Department of the corporation's bankruptcy proceedings. This form however does not prove the exact date business operations ceased.

Penalties were imposed pursuant to IITA Section 1001, 1002(c)(1) and 1005. At the hearing, taxpayer asks for an abatement of these penalties due to reasonable cause. Case law provides that "Reasonable cause means nothing more than the exercise of ordinary business care and prudence." Haywood Lumber & Mining Co. v. Commissioner, 162 F.2d 769 (2nd Cir. 1950). Taxpayer failed to provide sufficient reasons and documentation to establish that he

exercised ordinary business care and prudence. Thus, the request for an abatement of penalties must be denied.

Accordingly, I recommend that the Notice of Deficiency be finalized as issued.

Christine O'Donoghue
Administrative Law Judge